

Guardianship and Conservatorship From 30,000 feet

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Michigan Elder Justice Initiative

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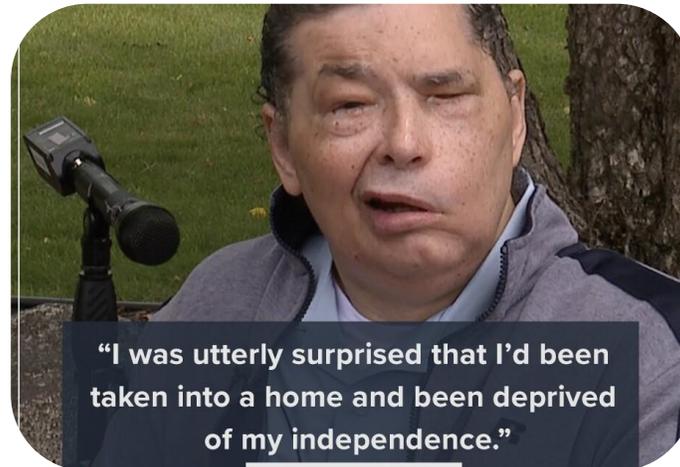
About me

- Began handling adult guardianship cases 13 years ago
- Statewide practice
- Support Legal Services lawyers across the state who represent victims of elder abuse and exploitation
- Regularly present to national audiences, including through the Department of Justice, ABA, and National Center for Law and Elder Rights
- Liaison to the American Bar Association Commission on Law and Aging
- Member of the Elder and Disability Rights Law and Probate & Estate Sections of the State Bar
- Here in my capacity as an inaugural member of the Elder Abuse Task Force and employee of the Michigan Elder Justice Initiative

Overview



What is EPIC adult guardianship?



Real Michiganders impacted by the system

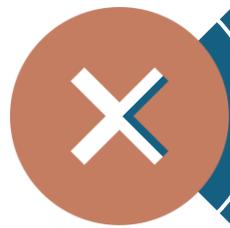


Opportunities for the legislature

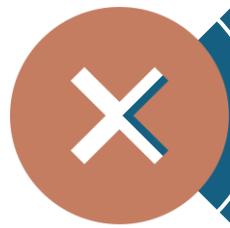
What are we talking about today?



Adult guardianship and conservatorship under EPIC



Minor guardianship under EPIC



Guardianship for adults with developmental disabilities under the Michigan Mental Health Code

What are Guardianship and Conservatorship

Guardianship

- When a court eliminates your rights to act on your own behalf and gives those rights to another person or organization

Conservatorship

- When a court eliminates your right to handle your finances on your own behalf and gives those rights to another person or organization

Defining terms

Developmental disability

Legally incapacitated individual

Protected person

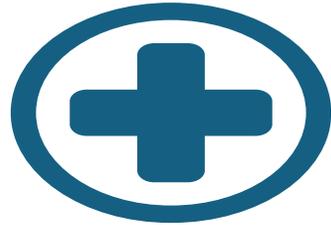
Interested person

certificate;

Under a full guardian



Marriage and divorce



Medical decisions



Living arrangements



Visits, communication,
and activities with loved
ones



Financial and property
decisions



Ability to appoint or
revoke fiduciaries

Step 1: Some precipitating event

Someone is concerned that the individual is

- “legally incapacitated” and
- guardianship is necessary

What the law contemplates

- Something* has happened to cause the individual to lose capacity in at least one area of life
- There are no alternatives* to address this and guardianship is necessary

Where it goes wrong

- Individual doesn't lack capacity
- There are alternatives*

Step 2: Advised on Alternatives

The Petitioner gets information on alternatives

- Pamphlets in the lobby
- Information on the website

What the law contemplates

- Upon reviewing this information, the petitioner may conclude guardianship is unnecessary

Where it goes wrong

- The petitioner needs to seek out this information and doesn't know where to get help
- Information is too general, hard to understand, or inapplicable

Step 3: Filing the petition

Who files?

- Adult Protective Services (APS)
- Hospitals and nursing homes
- Loved ones
- Anyone with an interest in the welfare of the alleged legally incapacitated individual

What the law contemplates

- People with knowledge of the individual and their circumstances file

Where it goes wrong

- Petitioners using the process to solve their own problems
 - Family and “friends” seeking control
 - Nursing homes using it for debt collection
 - Hospitals using it to reduce liability or enable discharge
- Contractors working on behalf of hospitals and nursing homes who have not met the individual

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Step 3
Continued:
Filing the
Petition

If it's an emergency, the petition may be granted on an emergency ex-parte (without notice or hearing) basis

No medical evidence required

Step 4: The Guardian Ad Litem

The Court must appoint a Guardian Ad Litem (GAL)

- Meet with the individual
- Advise them of their rights
 - To counsel
 - To hearing
 - To an independent evaluation
 - To object to the petition
- Report to the court

What the law contemplates

- The GAL effectively communicates to the individual and the court

Where it goes wrong

- The GAL doesn't communicate the gravity of the situation
- GAL substitutes "best interest" for capacity/necessity
- GAL has incentives to keep things moving
- The court relies on the GAL report despite evidentiary issues and the opportunity for a full adversarial hearing

Step 5: The Hearing

The Court conducts a hearing

What the law contemplates:

- A full adversarial bench trial with high quality evidence
- Every interested person is given the opportunity to present evidence, including calling and cross-examining witnesses

Where it goes wrong

- The individual is not present and/or not represented
- The GAL's report is given outsized influence
- Emotions run high and self-represented litigants struggle with procedure
- Parties pressured to agree to guardianship without understanding of consequences

Step 6: The Order

The Court issues an order on the petition

What the law contemplates:

- If the court finds by clear and convincing evidence that the individual is legally incapacitated and guardianship is necessary, the court appoints a guardian only in the specific areas where an individual lacks capacity
- The court appoints the person with the highest priority who is both suitable and willing to serve as guardian

Where it goes wrong

- Clear and convincing standard not met on one or both requirements
- Full guardianship granted even when partial is more appropriate
- Persons with priority are passed over in favor of others with lower priority

Step 7: Post-hearing

Next steps

- The guardian visits every 3 months
- The guardian files an annual report
- *Conservators file an inventory and then an annual account

What the law contemplates:

- The individual is protected in the least restrictive manner
- The guardian is knowledgeable about the individual
- Someone, somewhere, will raise an issue with the court if there is a problem

Where it goes wrong

- Corporate guardians delegate their duties
- Guardians have no required qualifications or training or limit to their caseload
- The court has no responsibility to review the inventory/account
- Guardianship reviews are inconsistent across the state
- Neglect and exploitation are hard to detect



Real Life
Examples:
Robert
Michell and
Barbara
Delbridge



“I was utterly surprised that I’d been taken into a home and been deprived of my independence.”

Rodrick Gordon
Placed under guardianship

Real Life Examples: Rodrick Gordon



7 INVESTIGATORS

FIGHTING FOR FREEDOM

DETROIT MAN FREED AFTER SPENDING 2+ YEARS UNDER GUARDIANSHIP

6:18
78°





Real Life Examples: Bessie Owens



COURT OF APPEALS

In re Guardianship OF MARY ANN MALLOY.

DARREN FINDLING, Coguardian of MARY ANN MALLOY, a legally protected person, and DARREN FINDLING LAW FIRM, PLC,

Plaintiffs-Appellees,

and

PATRICK MALLOY, Coguardian of MARY ANN MALLOY, a legally protected person, and KATHREN MALLOY,¹

Plaintiffs,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellant.

In re Guardianship of DANA JENKINS.

FOR PUBLICATION
October 13, 2022
9:05 a.m.

No. 358006
Oakland Probate Court
LC No. 2020-393904-CZ

¹ The probate court's April 2019 Order Regarding Modification of Guardianship identified Kathren Malloy and Darren Findling as coguardians. A May 21, 2021 Letters of Guardianship filed with the probate court identified Patrick Malloy as a coguardian with Darren Findling. The Letters of Guardianship were filed after entry of the order appealed in this matter. Accordingly, both Kathren Malloy and Patrick Malloy are listed as plaintiffs, though it does not appear that Kathren Malloy is currently a coguardian of Mary Ann Malloy.

Real Life Examples: Mary Ann Malloy and Dana Jenkins

Opportunities
for this
legislature





Dark Side: Lax Rules Open the Vulnerable to

reene Investigative Reporter | Holly Barker Legal Reporter

Dark Side of Protection: Part 1: The Profiteers

it guardianship industry is regulated loosely and ripe for exploitation of d disabled people, Bloomberg Law found in a six-month investigation.

Bloomberg Law investigation found the US guardianship industry in peril. The ngements often are dogged by ripe greed, scant scrutiny, scattershot rules, d flimsy protections for the vulnerable people put under court-ordered ontrol.

Read the full investigation: [Guardians' Dark Side: Lax Rules Open the Vulnerable](#)

Related Stories

- [Guardians' Abuses Persist As One State's Easy Fix Goes Unmatched](#)
March 10, 2023, 5:01 AM
- [Peter Max's Bare Ledgers Show Guardianships Drain Even The Rich](#)
March 9, 2023, 5:01 AM
- [420 Cases, One Guardian: System Runs](#)

Home >> Crime >> Courts

Ex-Nevada guardian to serve up to 40 years behind bars



This is a national issue, and Michigan can lead

Issues identified by constituents



Family members being passed over by courts in favor of professional guardians



A lack of transparency about finances and treasured items



Moving individuals from their longtime homes into institutional settings like nursing homes



Individuals unable to attend their own hearings



Delegation by professional guardians



Difficulty visiting the loved one subject to guardianship

Issues identified by task force members

- Role of the guardian ad litem
- Case scheduling orders
- Emergency/temporary guardianship
- Appointed counsel are minimally compensated for a full adversarial civil rights trial



How Michigan Can Lead

Set a standard for passing over family members

•HB 4909

Regulate delegation

•HB 4909

Create a GAL system that provides high-quality information to individuals and the court

•HB 4910

Prohibit GALs from representing an individual after making an adverse recommendation

•HB 4910

Require video visits for every month without an in person visit

•HB 4910

Pay attention to special tangible personal property

•HB 4910

Require that a permanent move from a home into a nursing home or elsewhere is truly necessary

•HB 4910

Set a uniform procedure for objecting to accounts

•HB 4910

Require that guardians provide financial information to interested persons

•HB 4910

Prioritize attendance of the individual subject to the petition and ending “traffic ticket” hearings

•HB 4911

Ensure medical reports provide high-quality information

•HB 4911

Focus on alternatives to guardianship

•HBs 4909-4912

Set a uniform standard for emergency guardianships

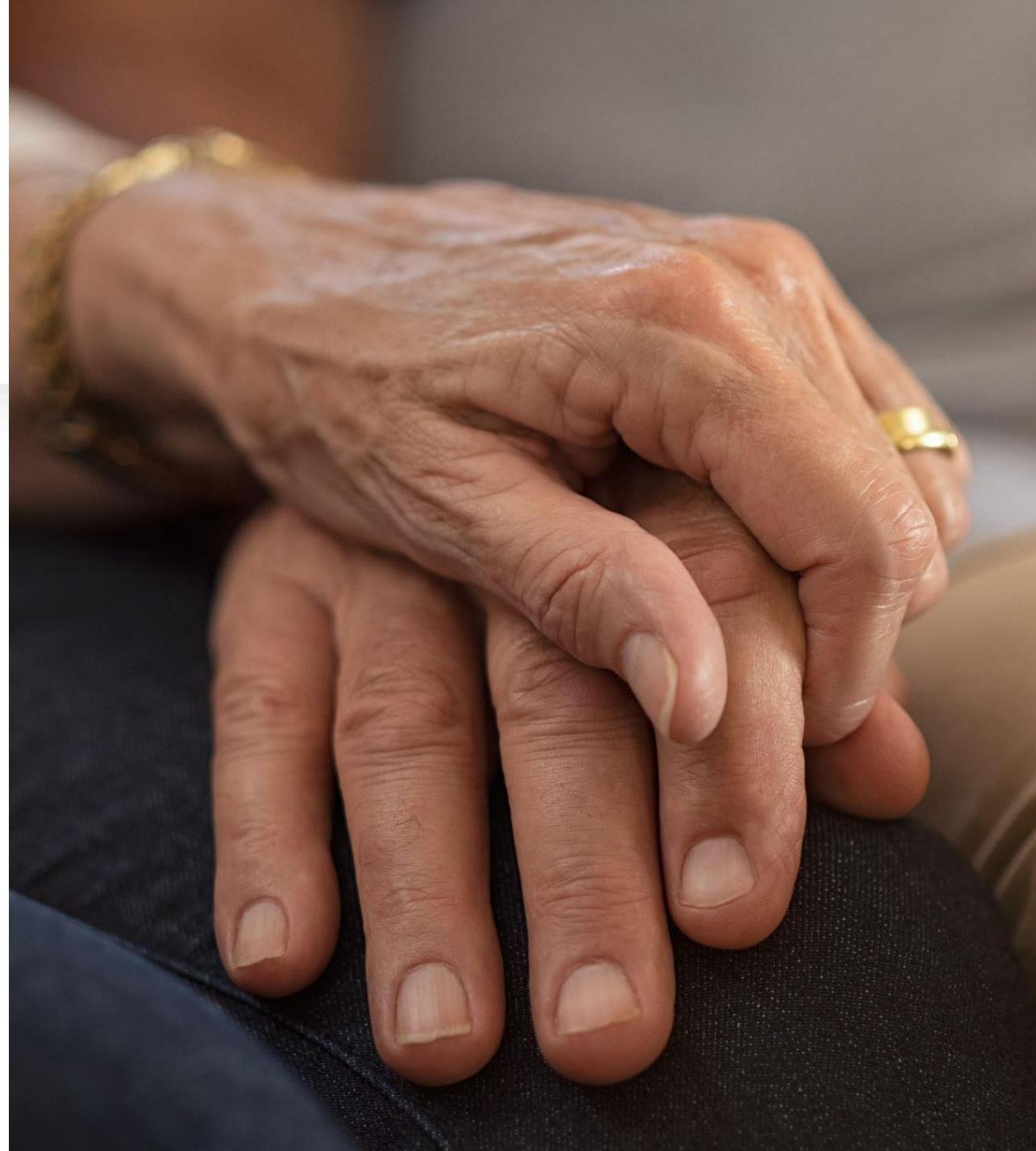
•HB 4911

Set a uniform standard for appointing a conservator

•HB 4910

Issues for further consideration

- Good guardians are already doing this
- Families are complicated
- This is “civil death” and it should be treated with the seriousness it deserves



Thank you

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